No. 14-1406

In The
Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In *Solem v. Bartlett*, this Court articulated a three-part analysis designed to evaluate whether a surplus land act diminished a federal Indian reservation. See 465 U.S. 463, 470-72 (1984). The Court found that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant to determining whether diminishment has occurred. *Id.* Later, in *Hagen v. Utah*, this Court explained that the diminishment inquiry requires courts "examine all circumstances surrounding the opening of a reservation." 510 U.S. 399, 412 (1994). This Court has also reiterated after *Solem* that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, . . . *de facto*, if not *de jure*, diminishment may have occurred." *South Dakota v. Yankton Sioux*, 522 U.S. 329, 356 (1998).

The questions presented for review are:

1. Whether ambiguous evidence concerning the first two *Solem* factors forecloses any possibility that diminishment could be found on a *de facto* basis.

2. Whether the original boundaries of the Omaha Indian Reservation were diminished following passage of the Act of August 7, 1882.

PARTIES TO THE PROCEEDING

Petitioners are Richard M. Smith, Donna M. Smith, Doug Schrieber, Susan Schrieber, Rodney A. Heise, Thomas J. Welsh, Jay Lake, Julie Lake, Kevin Brehmer, and Ron Brinkman ("Individual Petitioners"); the Village of Pender, Nebraska ("Village Petitioner"); and the State of Nebraska (collectively "Petitioners"). The State of Nebraska was Plaintiff-Intervenor in proceedings before the United States District Court for the District of Nebraska and Appellant to the Eighth Circuit Court of Appeals.

Respondents are Mitch Parker in his official capacity as Chairman of the Omaha Tribal Council; Barry Webster in his official capacity as Vice-Chairman of the Omaha Tribal Council; Amen Sheridan in his official capacity as Treasurer of the Omaha Tribal Council; Rodney Morris in his official capacity as Secretary of the Omaha Tribal Council; Orville Cayou in his official capacity as member of the Omaha Tribal Council; Eleanor Baxter in her official capacity as member of the Omaha Tribal Council; Ansley Griffin in his official capacity as member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control (the "Individual Respondents"); and the United States (collectively, "Respondents"). The United States was Defendant-Intervenor in proceedings before the United States District Court for the District of Nebraska and Appellee to the Eighth Circuit Court of Appeals.

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OPINIONS BELOW

The Omaha Tribal Court's order finding the Omaha Indian Reservation was not diminished is reproduced at J.A. 77. The district court's order finding the Omaha Indian Reservation was not diminished is available at 996 F. Supp. 2d 815 and reproduced at Pet. App. 9. The Eighth Circuit's order affirming the district court's order is available at 774 F.3d 1166 and reproduced at Pet. App. 1. The Eighth Circuit's decision denying rehearing en banc is available at 2015 U.S. App. LEXIS 3054 and reproduced at Pet. App. 80.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). On December 19, 2014, the Eighth Circuit affirmed the district court's order. On February 26, 2015, the Eighth Circuit denied rehearing en banc. Petitioners filed their petition for writ of certiorari on May 27, 2015, and this Court granted the petition on October 1, 2015.

STATUTES INVOLVED

The Act of June 10, 1872, is available at 17 Stat. 391 and reproduced at J.A. 631. The Act of August 7, 1882, is available at 22 Stat. 341 and reproduced at J.A. 227.

STATEMENT OF THE CASE

From 1882 until 2006, the State of Nebraska consistently, and exclusively, exercised civil and criminal jurisdiction over Pender, Nebraska and its surrounding areas[1] (hereinafter the "disputed area") without contest or objection from the Omaha Tribe of Nebraska (hereinafter "Omaha" or "Tribe") or the United States. J.A. 215-16, 369-72, 609. Since the early twentieth century, non-Indians have comprised over 98% of the disputed area's population and the United States conveyed over 98% of the land in the disputed area to non-Indians. J.A. 204, 206, 208, 364-68. The non-Indian residents of the disputed area have never been subjected to the jurisdiction of the Tribe and have developed justifiable expectations accordingly.

Before addressing the legal arguments, it is necessary to examine the relevant history of the boundaries at issue in this case.

I. The Original Boundaries Of The Tribe's Reservation.

Under the Treaty of March 16, 1854 ("1854 Treaty"), the Omaha ceded to the United States "all

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[1] Specifically, this includes all 50,157 acres of Thurston County, Nebraska, lying west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad. This includes the Village of Pender itself and the surrounding region west of the railroad right-of-way.

their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the main channel. . . ." J.A. 191, 1020. Under the 1854 Treaty, the original boundaries of the Omaha Reservation were set and the original size of the Omaha Reservation was approximately 300,000 acres. J.A. 192, 1021.

On March 6, 1865, the Omaha entered into another treaty ("1865 Treaty") whereby the Omaha ceded the northern part of the reservation to the federal government for fifty-thousand dollars ($50,000.00), which monies were to be expended for the Tribe's benefit, creating the Winnebago Reservation. J.A. 192, 1014-18. The 1865 Treaty reduced the size of the reservation to approximately 202,000 acres and ordered the allotment of the land to individual members of the Tribe. J.A. 192, 1014-18. By March of 1871, tribal members had received certificates for their allotments and all allotments taken under the 1865 Treaty were in the eastern, or non-disputed area, of the reservation. J.A. 193. In 1874, an additional 12,374 acres were sold to the Wisconsin Winnebagoes. J.A. 196.

II. Sale Of The Western Part Of The Reservation.

In August 1871, the Omaha, through their designated federal agent, began petitioning Congress to enact legislation authorizing the sale of the 50,000 acres comprising the western-most portion of the

reservation. J.A. 194, 419, 424. On January 22, 1872, Commissioner of Indian Affairs F.A. Walker recommended the requested legislation to Congress and stated: "I believe that the general idea of diminishing these reservations for the purpose of securing higher cultivation of the remaining lands, is consonant with sound policy." J.A. 194, 625. Congress responded by enacting the Act of June 10, 1872 ("1872 Act"), providing for the sale of up to 50,000 acres "to be taken from the western part" of the reservation and "to be separated from the remaining portion of said reservation." J.A. 631. However, apparently due in part to the availability and pricing of other land, the 1872 Act only resulted in the sale of approximately 300 acres. J.A. 333-35. In 1874, the Commissioner of Indian Affairs reported that the reservation contained 192,867 acres, but he continued: "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve." J.A. 360-61, 504.

In 1880, Congress considered legislation, as explained by Senator Alvin Saunders of Nebraska, to facilitate the sale of the western 50,000 acres of the reservation not sold under the 1872 Act. J.A. 196. The 1880 proposal did not advance. J.A. 197. Critically, however, on April 19, 1880, the Tribe granted the Sioux City and Nebraska Railroad Company a right-of-way through the reservation ("railroad right-of-way"), beginning at the northern edge and generally running southward along the Middle and Logan creeks. J.A. 336. The Tribe's decision to bring the

advent of the railroad to the reservation was a critical event for the subsequent diminishment of the reservation.

Two years after the Tribe granted the railroad right-of-way to the railroad company, Congress enacted the Act of August 7, 1882 ("1882 Act") which provided for the sale of "all that portion of [the Reservation] lying west of the right of way. . . ." J.A. 227-33. The railroad right-of-way now provided a clear demarcation of the boundary-line west of which all land would ultimately be sold (and a means, previously lacking, by which settlers and goods could readily transit to and from the region). As explained by Senator Saunders: "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed (J.A. 582, 644), ... Twice they have expressed themselves already in open council in favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold." J.A. 469.

According to the local Indian Agent's report submitted to the Senate Committee considering the bill, "there are no Indians living on the western portion of the Omaha Reservation." J.A. 583, 657. Therefore, Senator Ingalls, a member of the committee, explained that under the bill "[t]he lands that [the Tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely

relinquished." J.A. 647. The 1882 Act "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." J.A. 647. Senator Henry Dawes further explained: "When this bill came in I was troubled lest the sale of 50,000 acres would leave the [Omaha] reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation." J.A. 683.

On July 1, 1882, the House Committee offered a substitute bill that authorized both the sale of land on the western portion and allotment in severalty to Tribe members. J.A. 199, 339. During debate, Representative Edward Valentine of Nebraska assured his fellow legislators:

> You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They

> will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

J.A. 201, 726. When discussing the provision to allow Tribe members to select allotments west of the railroad right-of-way, Representative Valentine explained that "[t]hey do not care about making selections over on that side of the road at all." J.A. 739. On July 27, 1882, the House approved S. 1255 as amended to provide for both the grant of allotments to Tribe members from either the east or west portions of the Omaha Reservation, as well as the sale of the remaining portion of the reservation west of the railroad right-of-way to white settlers. J.A. 202, 340.

Although initially referred back to committee by the Senate, the Senate withdrew its opposition to the House amendment to S. 1255. J.A. 202, 340-41. On August 7, 1882, President Chester Arthur signed the bill into law. J.A. 202, 340-41.

Local Omaha and Winnebago Agent George Wilkinson subsequently reported that the Tribe consented to the Act on May 5, 1883. J.A. 345.

The 1882 Act directed a survey and appraisal before the lands west of the railroad right-of-way could be opened for settlement and sale. J.A. 227. The allotment provisions of the 1882 Act also needed to be carried out before any sale could be effected. J.A. 203-04, 207. Alice Fletcher, who was appointed by the Secretary of the Interior as a special agent to oversee

the allotment process, urged the Omahas to select land near the railroad right-of-way. J.A. 203-04, 347-48, 598. Few Omahas accepted Fletcher's advice; most preferred the eastern part of the reservation for its access to water and timber. J.A. 203-04, 347-48, 598. When the allotment process under the 1882 Act concluded, only 876 of the approximately 50,000 acres west of the railroad right-of-way (comprised of 10-15 allotments) had been allotted to members of the Tribe. J.A. 204, 347, 480. "No Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands." J.A. 598-99. All told, Indian allotments either wholly or partially west of the railroad right-of-way represented less than 2% of the total acreage west of the railroad right-of-way. J.A. 366-67. On April 30, 1884, the General Land Office opened 50,157 acres west of the railroad right-of-way for settlement by non-Indians. J.A. 204-05, 350.

III. Settlement Of The Western Part Of The Reservation.

According to the Secretary of the Interior's 1884 report, when the area west of the railroad right-of-way opened for settlement, "the major portion thereof was quickly absorbed by settlers. By September 1, 1884, 311 filings had been made, embracing about 43,000 acres." J.A. 357. Local Indian Agent Wilkinson confirmed the disputed area was "immediately occupied" by settlers. J.A. 486.

One settler, W.E. Peebles, left the town of Oakland, Nebraska, purchased a 160-tract of land near

the railroad right-of-way and platted a townsite to found the Village of Pender. J.A. 208, 357. Lots within the townsite were sold on April 7, 1885. J.A. 208, 357. Soon, Pender became the county seat of Thurston County, Nebraska. J.A. 357-58. Between 1885 and 1889, Pender grew to a population of more than 300. J.A. 357. Available data from the U.S. Census Bureau for the relevant townships in Thurston and Cuming Counties indicates that, since at least 1900, the non-Indian population west of the railroad right-of-way has ranged from 98.18% to 99.95%. J.A. 208, 366.

The following chart shows the U.S. Census Bureau data for the Indian and non-Indian populations in the disputed area west of the railroad right-of-way compared to the eastern part of the reservation.

Census Year		Total	Non-Indian	Non-Indian%	Indian	Indian%
1900	Thurston – East of ROW	2361	1404	59.47%	957	40.53%
	Thurston & Cuming West of ROW	4374	4362	99.73%	12	0.27%
1910	Thurston – East of ROW	3778	2838	75.12%	940	24.88%
	Thurston & Cuming West of ROW	3957	3885	98.18%	72	1.82%
1920	Thurston – East of ROW	4399	3748	85.20%	651	14.80%
	Thurston & Cuming West of ROW	3846	3844	99.95%	2	0.05%
1930	Thurston – East of ROW	4841	3822	78.95%	1019	21.05%
	Thurston & Cuming West of ROW	4188	4153	99.16%	35	0.84%
1990	Thurston – East of ROW	3248	1365	42.03%	1883	57.97%
	Thurston & Cuming West of ROW	2624	2613	99.58%	11	0.42%
2000	Thurston – East of ROW	3349	1012	30.22%	2337	69.78%
	Thurston & Cuming West of ROW	2519	2498	99.17%	21	0.83%

IV. United States' Treatment Of The Disputed Area.

After enactment of the 1882 Act, the United States consistently treated the 50,000+ acres opened for settlement west of the railroad right-of-way as no longer being part of the reservation. In 1884, Indian Agent Wilkinson described the settlers as "surrounding the[ ] reservation[ ]." J.A. 490. By 1885, the Commissioner of Indian Affairs reported that all lands lying west of the railroad right-of-way had been sold to non-Indian settlers. J.A. 500. In the Commissioner's opinion, the Winnebagoes would realize a great benefit from legislation "substantially similar" to the "Omahas (act of August 7, 1882)." J.A. 503. Like the Omahas, the Winnebagoes:

> [W]ould then have the benefit and be subject to the laws, both civil and criminal, of the State (Nebraska), and have individual title to their lands. As in the case of the Omahas, the unallotted lands remaining within the diminished reserve could be patented to the tribe in common.

J.A. 503. Consistent with the Commissioner of Indian Affairs' report, in 1885, local Agent Wilkinson described the results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder." J.A. 350, 496, 1076.

In 1890, Indian Agent Robert Ashley reported that the Winnebago and Omaha reservations collectively "embrace[] the entire county of Thurston, Nebr., except a portion of the reservation which has been sold and is now occupied by the white purchasers." J.A. 606, 798. Agent Ashley made a similar statement in 1892. J.A. 817. Then, in 1901, Indian Agent Charles Mathewson reported: "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and form the southwestern boundary of the Omaha Reservation." J.A. 841. In 1904, the superintendent in charge of the Omaha Agency reported: "This agency is located on the east side of the Omaha Reservation about 3 miles from the Missouri River, which forms the eastern boundary, and 20 miles from the western boundary line, which is marked by a section of the Northwestern Railway line extending between Omaha and Sioux City." J.A. 607; see also J.A. 1076.

The Office of Indian Affairs ("OIA") did not include the land west of the railroad right-of-way as part of the reservation in its reports of 1884, 1888, 1898, 1900, 1906, 1909, or 1911. J.A. 206-07, 517, 522, 525, 531, 536, 615. In each of these reports, the 1882 Act was specifically identified as a basis for concluding the area west of the railroad right-of-way was not within the total acreage of the reservation. J.A. 206-07, 517, 522, 525, 531, 536, 615. Similarly, the Winnebago Agency Annual Statistical Report for 1935 provides the total area of the original reservation was reduced by 162,504.53 acres in light of three

events, listing the sale of 50,157.00 acres of land west of the railroad right-of-way as one of such events. J.A. 208, 541.

A series of maps of the Omaha Reservation, compiled under the direction of the Commissioner of Indian Affairs, also show federal authorities believed the 1882 Act diminished the reservation. J.A. 1298-1300. In 1883, a map of Indian reservations, compiled under the direction of Hiram Price, Commissioner of Indian Affairs, revealed that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. J.A. 1298, *available at* http://www.loc.gov/resource/g3701g.ct002649/. In 1888, a new map of Indian reservations "compiled from official and authentic sources, under the direction of the Hon. JNO. H. Oberly, Commissioner of Indian Affairs," showed that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. J.A. 1299, *available at* http://www.loc.gov/resource/g3701g.ct002651/. Similarly, an 1892 map of Indian reservations "compiled under the direction of Hon. T.J. Morgan, Commissioner of Indian Affairs," showed that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. J.A. 1300, *available at* http://www.loc.gov/resource/g3701g.ct002305/.

Additionally, Congress authorized the Secretary of the Interior, with the consent of the Tribe, to extend the non-Indian settler's land payment schedules on multiple occasions. J.A. 205, 352. The 1888 extension directed the Secretary of the Interior to declare certain purchasers' tracts forfeited due to default on payment. J.A. 206, 352. Upon forfeiture, a settler's

tract did not revert back to the Tribe but instead was to be sold at public auction. J.A. 206, 360.

Section 8 of the 1882 Act provided that any "residue" lands lying east of the railroad right-of-way were to be patented to the Tribe in common and held in trust by the federal government. J.A. 232. In contrast, the 1882 Act contained no such provision for the land west of the railroad right-of-way. Furthermore, by 1919, all lands allotted to Tribal members west of the railroad right-of-way had been patented in fee simple. Thus, no trust land remained west of the railroad right-of-way demarcation line. J.A. 360.

An October 10, 1964, Bureau of Indian Affairs "Base Map" of the Omaha Indian Reservation contains a note reading:

> The land lying to the West of the line between Township 24 North, Range 7 East, and Township 24 North, Range 6 East, and West of the Sioux City and Nebraska Railroad Right-of-way (now C St. P. M & O RR) as it passed through Township 25 North, Range 6 East was "Opened for Settlement" by the Act of August 7, 1882, 22 Stat. 341. **This Office holds the opinion that the Act of Congress has DIMINISHED the borders of the Omaha Reservation.**

J.A. 562-64 (emphasis added).

In 1989, when asked by the Bureau of Indian Affairs to locate the western boundary of the Omaha Indian Reservation and after conducting an extensive historical and statutory review, the Office of the

Solicitor of the United States Department of the Interior confirmed "the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned [Sioux City and Nebraska Railroad Company] right of way. . . . [U]nder the 1882 Act the land to the west of the right of way went out of Indian control when it was opened for settlement." J.A. 213-14, 369-70.

In 2012, only after the Individual Petitioners initiated the underlying action in federal court, the 1989 Department of Interior's opinion was officially withdrawn in response to a post-litigation letter from the Twin Cities Field Solicitor. J.A. 214, 281. This official change in the United States' views on jurisdiction over the disputed area occurred approximately 130 years after the 1882 Act.

V. Nebraska's Longstanding Jurisdiction Over The Disputed Area.

The State of Nebraska exercised jurisdiction over Pender without contest or objection from either the Omaha or the United States for nearly 125 years, from 1882 until 2006. West of the railroad right-of-way, all governmental services are provided by State and local agencies, not by the Tribe. J.A. 215-16, 319.

A significant example of the State's unquestioned authority occurred in a 1999 criminal case, when the United States voluntarily relinquished authority to Nebraska over a major crime committed by an Indian within the disputed area. In 1999, Winnebago

tribal member Damon Picotte of Macy shot and killed a non-Indian in the non-Indian's Pender home. J.A. 145. Picotte was originally apprehended by Omaha Tribal police and held by federal officers, but was voluntarily relinquished and transferred to state custody to be tried in state court. J.A. 145-52. When Picotte argued that the State lacked jurisdiction because the crime occurred on the reservation, the State district court for Thurston County rejected this defense and determined that the land west of the railroad right-of-way was not a part of the Omaha reservation. J.A. 145-52. Ultimately, Picotte was convicted of Second Degree Murder and is currently incarcerated in a Nebraska State prison. *Order on State v. Picotte*, Case No. CR 00-6 (D. Ct. Thurston County, Nebraska, Dec. 14, 2000); see also http://dcs-inmatesearch.ne.gov/Corrections/COR_input.html.

On July 23, 2001, the Nebraska Attorney General issued a memorandum to the Director of the Nebraska Department of Environmental Quality confirming "[a] large portion of Pender lies outside the diminished boundaries of the Omaha Reservation as a result of the 1882 Act." J.A. 157-83. Later, on February 15, 2007, the Nebraska Attorney General issued an opinion which also concluded that the land west of the railroad right-of-way was not part of the Omaha Reservation. J.A. 215; Neb. Op. Atty. Gen. No. 07005.

In 1953, when Public Law 280 transferred jurisdiction over "All Indian country within the State" of Nebraska to the State, it did not specifically delineate

the boundary lines of such Indian country. 18 U.S.C. § 1162; 28 U.S.C. § 1360. In 1969, when the State of Nebraska retroceded a portion of that jurisdiction "in the areas of Indian country located in Thurston, County, Nebraska," the State did not define any reservation boundaries in its retrocession. J.A. 1122-24. Even though P.L. 280 and Nebraska's retrocession did not define any reservation boundaries, the United States accepted the retrocession on different terms than what Congress originally transferred and the State retroceded. 35 Fed. Reg. 16598 (1970).[2]

VI. Treatment Of The Disputed Area By The Tribe.

Before 2006, the Omaha never enforced tribal ordinances west of the railroad right-of-way. J.A. 215-16. The Tribe has never offered foster care, medical, welfare, or child protective services in the disputed area. J.A. 216. The Tribe has no office, operates no schools, industries, or businesses in the disputed area and has not conducted any governmental or ceremonial activities west of the railroad-right of-way. J.A.

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[2] In a few limited modern-day instances, the Nebraska Department of Revenue indicated the Reservation existed as originally surveyed. J.A. 216. However, these revenue rulings do not include any historical or legal jurisdictional analysis of the Reservation's boundaries. All of those revenue rulings were also later superseded and rescinded by the Nebraska Department of Revenue prior to this litigation. Neb. Revenue Ruling 99-05-01 (Sept. 29, 2005).

216. The Tribe has no mineral rights or other claims to land in the disputed area. J.A. 216.

VII. Enforcement Of The Ordinance And Subsequent Litigation.

On February 28, 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code, promulgating the Beverage Control Ordinance ("Ordinance"). J.A. 187. The Ordinance imposes a licensing scheme and a 10% sales tax on the purchase of alcoholic beverages from any licensee within the reservation. J.A. 187-88. The Ordinance was certified by the Department of Interior in 2006. 71 Fed. Reg. 10,056 (Feb. 28, 2006). Shortly after the Ordinance's promulgation, Individual Petitioners received application forms and requests to remit the 10% tax in the mail from the Tribe. J.A. 189. When the Individual Petitioners did not respond, the Tribe sent a second notice to Individual Petitioners informing them that they were subject to the Omaha Tribal Code and to fines up to $10,000.00 per violation. J.A. 189-90.

In response to the Tribe's attempt to enforce the Omaha Tribal Code west of the railroad right-of-way, Individual Petitioners commenced this action. J.A. 56, 66-76, 190. The United States District Court for the District of Nebraska, pursuant to 28 U.S.C. § 1331, granted Individual Petitioners a temporary restraining order against the enforcement of the Ordinance on April 17, 2007. J.A. 190. The district court stayed

further proceedings to exhaust any remedies in the Omaha Tribal Court. J.A. 190. Individual Petitioners filed an action in the Omaha Tribal Court seeking a declaration as to whether Pender, Nebraska lay within the boundaries of the Omaha Indian Reservation and an injunction against any future enforcement of the Ordinance. J.A. 190. On cross-motions for summary judgment, the Omaha Tribal Court determined that the original boundaries of the reservation had not been diminished. J.A. 139, 191.

Proceedings resumed before the federal district court. J.A. 191. The State of Nebraska intervened to retain its longstanding jurisdiction over the geographic area at issue, i.e., the approximately 50,157 acres, including, but not limited to, the Village of Pender, Nebraska. J.A. 285-99. The United States intervened in support of the Tribe. J.A. 300-14. The parties and intervenors filed cross-motions for summary judgment on the issue of whether the Omaha Indian Reservation was diminished following the 1882 Act such that the disputed area was no longer within its borders.

The district court ruled in favor of the Tribe on cross-motions for summary judgment. Pet. App. 77-78. The district court held that ambiguous evidence regarding the first two *Solem* factors – statutory language and legislative history – necessarily foreclosed any possibility that diminishment would be found on a *de facto* basis. Pet. App. 68.

Petitioners appealed to the Eighth Circuit and that court issued a panel opinion affirming the judgment of the district court. Pet. App. 1-8. The panel determined that the "[district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus." Pet. App. 7. Petitioners were denied rehearing en banc. Pet. App. 80-81.

SUMMARY OF THE ARGUMENT

The legal issue in this case is whether the disputed area remains part of the Omaha Indian Reservation, despite both the Omaha and the United States having declined to exercise Indian-country jurisdiction over the area since the late nineteenth century. This is not a matter of mere historical curiosity or academic interest. Rather, the Court's decision will significantly impact the future of an entire community and its residents. If this Court upholds the lower courts' ruling that the disputed area remains part of the reservation, the practical consequences will be profound for the residents of the disputed area after over one hundred years of justifiable reliance upon Nebraska and local governmental institutions and services.

"As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984). In *Solem*, the Court articulated a three-part analysis designed to evaluate whether a surplus land act may have resulted in a diminishment of a federal Indian reservation. *Id.* at 470-72. The Court concluded that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant to determining whether diminishment has occurred. This Court has since explained that the diminishment inquiry requires courts "examine all circumstances surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The doctrine of "*de facto* diminishment" arises from a court's consideration of the third *Solem* factor – events occurring after passage of a surplus land Act. *Solem*, 465 U.S. at 471-72.

This Court has recognized that its ability to rely on express statutory language to discern congressional intent is limited because "the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant." *Solem*, 465 U.S. at 468. Indeed, the diminishment "inquiry is informed by the understanding that . . . Congress did

not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Id.*

Accordingly, the Court must also consider whether the treatment of the area following the opening of the reservation to non-Indian settlement resulted in *de facto* diminishment. See, *e.g.*, *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215-16 (2005) (in a different, but related context, reiterating that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, may create justifiable expectations"), *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.3 and 604-05 (1977); *Solem*, 465 U.S. at 472; see also *Yankton Sioux Tribe*, 522 U.S. at 356-57

Solem explained the nature of *de facto* diminishment as follows:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded

> into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.
>
> In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of the opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.
>
> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments. Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.

Solem, 465 U.S. at 471-72 n.12 & 13 (internal citations omitted).

The demographic and jurisdictional history of the disputed area west of the railroad right-of-way, necessitates a finding of *de facto* diminishment. "[A] contrary conclusion would seriously disrupt the

justifiable expectations of the people living in the area." *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

ARGUMENT

I. NEBRASKA'S UNCHALLENGED HISTORY OF JURISDICTION OVER THE DISPUTED AREA SHOWS DIMINISHMENT.

The State of Nebraska has consistently exercised jurisdiction over, and provided governmental services to, the people living in the disputed area west of the railroad right-of-way from 1882 through 2006. The State's exclusive control over an area populated by more than 98% non-Indians has created the justifiable expectations by the residents who live west of the railroad right-of-way that they are not subject to tribal regulation.

There is no dispute that:

- Immediately following the 1882 Act, the major portion of the disputed area was quickly absorbed by settlers, J.A. 357, 486, 490, 500;
- Since the early twentieth century, non-Indians have comprised more than 98% of the area's population, J.A. 208;
- More than 98% of the land in the area was conveyed from the United States to non-Indians, J.A. 204, 206;

- The State of Nebraska exercises criminal jurisdiction over the disputed area, J.A. 145-52, 215-16, 319, 369-72, 609;
- Neither Pender nor its residents have ever been subjected to the jurisdiction of the Tribe, J.A. 215-16;
- The Tribe has no office, operates no schools, industries, or businesses in the disputed area and has not conducted any governmental or ceremonial activities there, J.A. 216;
- The Tribe has no mineral rights or other claims to land in the disputed area, J.A. 216; and
- Before 2006, the Tribe never enforced tribal ordinances west of the railroad right-of-way. J.A. 215-16.

From 1882 until 2006, the State of Nebraska consistently exercised jurisdiction over Pender without any dispute or objection from the Omaha or the United States. J.A. 145-52, 215-16, 319, 369-71, 605. This Court has recognized that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, may create justifiable expectations." *City of Sherrill, N.Y.*, 544 U.S. at 215-16 (quoting *Rosebud Sioux Tribe*, 430 U.S. at 604-05); *Hagen*, 510 U.S. at 421. The Nebraska residents living in the disputed area have developed justifiable expectations over the past 130 years. The Eighth Circuit's decision alters the status quo by expanding the jurisdiction of the Tribe over the disputed area.

A. Disputed Area Has No History Of Indian Character.

The demographics of the area are undisputed and confirm diminishment of the Omaha Reservation. Prior to the passage of the 1882 Act, the disputed area had not been settled by either Indians or non-Indians. J.A. 583, 657. According to a report submitted by the local Indian agent leading up to passage of the 1882 Act, "there are no Indians living on the western portion of the Omaha Reservation." J.A. 657. Neither did Congress expect the Indians to select their allotments west of the railroad right-of-way. As Representative Valentine stated while specifically discussing the provision to allow Indians to select allotments west of the railroad right-of-way prior to the lands being sold: "They do not care about making selections over on that side of the road at all." J.A. 739.

Alice Fletcher, who was appointed by the Secretary of the Interior as a special agent to oversee the allotment process, urged the Omahas to select land near the railroad right-of-way. J.A. 203-04, 347-48, 598. Few Omahas accepted Fletcher's advice; most preferred the eastern part of the reservation for its access to water and timber. J.A. 203-04, 347-48, 598. "No Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands." J.A. 598-99.

In contrast, according to Senator Saunders, settlers were "ready to buy the land and put it in cultivation." J.A. 583, 644, 1227. The rapid settlement anticipated by Congress quickly materialized.

In 1884, the Secretary of the Interior reported to Congress that "[u]pon opening the lands to settlement the majority thereof was quickly absorbed by settlers." J.A. 357. Local Agent Wilkinson confirmed the disputed area was "immediately occupied" by settlers. J.A. 486.

One of those early settlers after the 1882 Act, W.E. Peebles, left the town of Oakland, Nebraska, purchased a 160-tract of land west of the railroad right-of-way, and platted the townsite which quickly became the village of Pender. J.A. 208, 357. Lots within the townsite were sold on April 7, 1885. J.A. 208, 357. Soon, Pender became the county seat of Thurston County, Nebraska and between 1885 and 1889, Pender grew to a population of more than 300. J.A. 357. Available data from the U.S. Census Bureau for the relevant townships in Thurston and Cuming Counties indicates that, since at least 1900, the non-Indian population west of the railroad right-of-way has ranged from 98.18% to 99.95%. J.A. 208, 366.

Percentage of non-Indian population by decade:

	1900	1910	1920	1930	1990	2000
West of Railroad ROW	99.73%	98.18%	99.95%	99.16%	99.58%	99.17%
East of Railroad ROW	59.47%	75.12%	85.20%	78.95%	42.03%	30.22%

J.A. 368.

The historical record indeed shows that the population of Tribe members living west of the railroad right-of-way has always been extremely small. Since 1900, there have never been more than 72 Indians (1.8% of the total population) living on this land, and as of the year 2000, only 21 Indians (0.83% of the total population) lived there. J.A. 365-68. These facts stand in stark contrast to the demographics of the land east of the railroad right-of-way, where 2337 Indians (69.78% population) lived as of 2000. J.A. 366, 368. This near-total absence of Indian character, combined with the State of Nebraska's consistent assertion of jurisdiction over this land, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421.

Furthermore, the demographic history supports a finding of *de facto* diminishment. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471 (citing *Rosebud Sioux Tribe*, 430 U.S. at 588 n.3; and *DeCoteau*, 420 U.S. at 428); accord *Yankton Sioux Tribe*, 522 U.S. at 356-57. "In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, [courts] look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem*, 465 U.S. at 471-72. The demographic history here – both before

and after the 1882 Act – show that this land has never had any Indian character and that Congress expected the disputed area to no longer be part of the reservation.

B. Less Than 2% Of The Total Acreage Of The Disputed Area Was Allotted To Tribal Members.

Non-Indian land use in the disputed area mirrors its demographics and confirms diminishment. Following the survey and appraisal of the segregated land west of the right-of-way, it was opened for settlement on April 30, 1884. J.A. 204. "Upon opening the lands to settlement the majority thereof was quickly absorbed by settlers. By September 1, 1884, 311 filings had been made, embracing about 43,000 acres." J.A. 357.

In contrast, when given the option of selecting their land west of the railroad right-of-way, nearly all Omahas preferred the eastern part of the reservation. J.A. 203-04, 347-48, 598. Only 10 to 15 Indian allotments totaling 876 of the approximately 50,000 acres, less than 2% of the total acreage, in the area had been allotted to Tribal members. J.A. 204, 350. In total, Indian allotments either wholly or partially in the disputed area taken by members of the Tribe represent approximately 1.72% of the total acreage west of the railroad right-of-way. J.A. 204. The remaining 98.28% of the land was conveyed from the United States to non-Indians, with the final remaining parcel selling in 1913. J.A. 206. And by 1919, "all

lands allotted to Omaha Tribe members west of the Railroad right-of-way had been patented in fee simple; thus, no trust land remained west of the demarcation line." J.A. 206, 360.

The combined statistics on demographics and land use are even more compelling than those described in the four cases where this Court found diminishment. See *Yankton Sioux Tribe*, 522 U.S. at 356-57 (two-thirds of the population was non-Indian and more than 90% of the reservation lands were in non-Indian lands); *Hagen*, 510 U.S. at 421 (involved land that was "over 90% non-Indian both in population and in land use"); *Rosebud Sioux Tribe*, 430 U.S. at 605 (involved land that was "over 90% non-Indian both in population and in land use"); *DeCoteau*, 420 U.S. at 428 (approximately 90% of the population was non-Indian and collectively owned approximately 85% of the land); *contra Solem*, 465 U.S. at 480 (finding no diminishment where the overall population of the land was evenly divided between Indians and non-Indians). This near-total absence of Indian character, combined with the State of Nebraska's consistent assertion of jurisdiction over this land, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421; see also *City of Sherrill, N.Y.*, 544 U.S. at 197.

C. Nebraska's History Of Jurisdiction Over The Disputed Area.

Nebraska's longstanding exercise of jurisdiction logically flows from Congress' intent. Senator Ingalls, a member of the committee that reported the Act, explained that under the Act "*the interest and control and jurisdiction of the United States is absolutely relinquished.*" J.A. 647 (emphasis added). In 1885, the Commissioner of Indian Affairs clearly agreed when he advocated for the Winnebagoes to realize a "great benefit" from legislation "substantially similar" to the "Omahas (act of August 7, 1882)" and "be subject to the laws, both civil and criminal, of the State (Nebraska)." J.A. 503. It is unsurprising then, that the State of Nebraska immediately assumed jurisdiction over the area.

The United States and the Tribe abided by this arrangement for more than a century. Indeed, as recently as 1999, the disputed area was "routinely patrolled by State and Village of Pender officers; neither officers of the Tribe nor the Bureau of Indian Affairs have provided law enforcement presence in the opened lands." J.A. 151. This "longstanding assumption of jurisdiction" by Nebraska over the disputed area, which is over 90% non-Indian both in population and in land use, demonstrates the parties' understanding that the 1882 Act diminished the Omaha Reservation. *Rosebud Sioux Tribe*, 430 U.S. at 604-05.

Notably, in 1999, the United States voluntarily relinquished authority to the State of Nebraska to prosecute Damon Picotte, a Winnebago tribal member, in state court for committing a murder in the Village of Pender. Picotte's murder was committed fifteen years after the 1984 *Solem* decision in which this Court upheld granting a writ of habeas corpus because the State of South Dakota did not have jurisdiction to prosecute a defendant for a crime committed on land that was not diminished from an Indian reservation. J.A. 145-52. Remarkably, the United States is now taking a position entirely inconsistent with its 1999 post-*Solem* action, where it depended upon the State of Nebraska to prosecute Picotte for his serious crime.

Attempting to cloud the clear jurisdictional picture showing the State of Nebraska assuming and exercising consistent jurisdiction of the disputed area, the United States has previously pointed to the inclusion of alternative boundary lines when the United States accepted Nebraska's retrocession of jurisdiction following P.L. 280. Br. in Opp. to Pet. 7; see 35 Fed. Reg. 16598 (1970). However, when P.L. 280 transferred jurisdiction over "All Indian country within the State" of Nebraska to the State in 1953 it did not delineate the boundary lines of such Indian country. 18 U.S.C. § 1162; 28 U.S.C. § 1360. In 1969, when the State of Nebraska retroceded a portion of that jurisdiction "in the areas of Indian country located in Thurston County, Nebraska," the State did not define any reservation boundaries in its

retrocession. J.A. 1122-24. The United States' acceptance of retrocession on different terms than what Congress originally transferred, and the State later retroceded, does not alter the intent behind the 1882 Act that the "jurisdiction of the United States [was] absolutely relinquished." J.A. 647. Regardless of the acceptance of retrocession language, the State of Nebraska immediately assumed exclusive jurisdiction over the area in 1882 without contest from the Tribe or United States until recently.

D. All Governmental Services In The Disputed Area Are Provided By State And Local Authorities.

Nebraska's longstanding assumption of jurisdiction in the disputed area is not limited to criminal matters. In the disputed area, *all governmental services are provided by state and local agencies*. J.A. 319. The Tribe has never sought to enforce the provisions of the Omaha Tribal Code west of the right-of-way although the Tribe has enforced its code east of the railroad right-of-way. J.A. 215-16. Nor does the Tribe offer foster care, medical, welfare or child protective services west of the railroad right-of-way. J.A. 216. Also notable, the Tribe does not have an office and does not operate a school, industry, or business in the disputed area. J.A. 216. The Tribe does not have a single school to educate the children living in the disputed area. The Tribe's seat of government is not in the disputed area, but instead twenty miles east of the area in Macy, Nebraska. J.A.

216. Put simply, the historical record is devoid of facts suggesting the Tribe ever sought to assert jurisdiction over the town of Pender until the twenty-first century. J.A. 609.

E. United States History Of Treating The Disputed Area As Diminished.

For over a century after the 1882 Act, the United States exhibited a steady pattern regarding the disputed area confirming that it had absolutely relinquished all jurisdiction and control:

- *1883*: United States' map of reservation shows boundary does not extend west of the railroad right-of-way. J.A. 1298.
- *1884*: Disputed area not included in OIA acreage report and Indian Agent Wilkinson describes settlers as "surrounding the reservation." J.A. 206, 615.
- *1885*: Commissioner of Indian Affairs reports all lands in the disputed area had been sold to non-Indian settlers, are "subject to the laws, both civil and criminal, of the State (Nebraska)," and the remaining lands are "within the diminished reserve." J.A. 503. Indian Agent Wilkinson confirms the "Omahas have reduced their reservation." J.A. 350, 1076.
- *1888*: Disputed area not included in OIA acreage report and United States' map of reservation shows boundary does not

extend west of the railroad right-of-way. J.A. 206, 1299.

- *1890*: Indian Agent Ashley reports the reservation does not include the portion sold and occupied by white purchasers. J.A. 606, 798.
- *1892*: Indian Agent Ashley reports the reservation does not include the portion sold and occupied by white purchasers and United States' map of reservation shows boundary does not extend west of the railroad right-of-way. J.A. 817, 1300.
- *1898*: Disputed area not included in OIA acreage report. J.A. 207, 517.
- *1900*: Disputed area not included in OIA acreage report. J.A. 207, 522.
- *1901*: Indian Agent Mathewson reports the railway forms the southwestern boundary of the reservation. J.A. 207, 841.
- *1904*: Superintendent in charge of Omaha Agency reports the western boundary line of the reservation is the railway line. J.A. 607; see also J.A. 1076.
- *1906*: Disputed area not included in OIA acreage report. J.A. 207, 525.
- *1909*: Disputed area not included in OIA acreage report. J.A. 207, 531.
- *1911*: Disputed area not included in OIA acreage report. J.A. 207, 536.

- *1935*: Annual Statistical Report for Omaha Reservation lists the Omaha Reservation as encompassing 137,495.47 acres and "Sale – Land W. of RR." as a "reduction to the reservation." J.A. 208, 541.
- *1964*: Bureau of Indian Affairs "Base Map" of the reservation shows boundary does not extend west of the railroad right-of-way and reiterates "[t]his Office holds the opinion that the [1882] Act of Congress has DIMINISHED the borders of the Omaha Reservation." J.A. 562-64, 969-70 (emphasis in original).
- *1989*: Office of the Solicitor of the United States Department of Interior confirms the "western boundary of the Omaha Reservation is the centerline of the abandoned [railroad] right of way." J.A. 213-14, 369-70, 1193.
- *1999*: The United States does not challenge the State of Nebraska's assertion of criminal jurisdiction over Winnebago Tribe Member Picotte when he shot and killed a non-Indian in her Pender home. J.A. 145-52.

Despite this steady pattern, and only in 2012 after the current litigation was filed by the Individual Petitioners disputing the Tribe's authority to tax liquor sales in Pender, the Department of Interior withdrew the 1989 opinion and appears to have officially changed its view for the convenience of litigation. J.A. 214, 281.

The Tribe and United States have attempted to inject ambiguity by focusing on recent efforts by the Department of the Interior and other federal agencies to assert jurisdiction that are "too far removed temporally from the [1882 Act] to shed much light on Congressional intent." *Osage Nation v. Irby*, 597 F.3d 1117, 1126 (10th Cir. 2010). Indeed, authorities' treatment of the disputed area "in the years immediately following the opening," *Solem*, 465 U.S. at 471, is far more probative than actions over a century after the 1882 Act. Put simply, "in light of the clear assumption of jurisdiction over the past [130] years by the State . . . on the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory history of congressional and administrative actions in other respects carries but little force." *Rosebud Sioux Tribe*, 430 U.S. at 604, n.27; see also *Yankton Sioux Tribe*, 522 U.S. at 356-57 (refusing to allow modern attempts by the Tribe to exercise civil, regulatory, or criminal jurisdiction to change its conclusion that "[t]he State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day," reinforced its holding of diminishment).

The Omaha Reservation was diminished long ago. The State of Nebraska's longstanding assumption of jurisdiction, acquiesced to by the Tribe and the United States, over the disputed area shows *de facto* diminishment of the reservation which is also

consistent with the legislative history that the 1882 Act would diminish the reservation.

II. THE CONTEXT SURROUNDING THE 1882 ACT SHOWS CONGRESS INTENDED TO ALTER THE RESERVATION'S BOUNDARIES.

> The context in which Congress enacted the 1882 Act shows Congress intended to diminish the Reservation. "When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, [courts] have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remain unchanged."

Solem, 465 U.S. at 471.

The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343. The congressional purpose prior to and under the 1882 Act to diminish the reservation was clear.

A. Prior To The 1882 Act, Congress Repeatedly Attempted To Separate And Sell The Disputed Area.

In both *Hagen* and *Rosebud Sioux Tribe*, this Court concluded congressional acts diminished the reservations by viewing those acts through the lens of earlier congressional action. See *Hagen*, 510 U.S. at 415-16 (refusing to interpret the last congressional act, which had only general allotment language, in isolation "because the baseline intent to diminish the reservation expressed in [an earlier act] survived the passage of the [later act]"); *Rosebud Sioux Tribe*, 430 U.S. at 612-13 (construing the 1904, 1907, and 1910 Acts, which affected different portions of the same reservation, together to conclude Congress intended to diminish the reservation with each Act). As in *Hagen* and *Rosebud Sioux Tribe*, this Court must read the 1882 Act in light of its historical context, including the repeated efforts of the Tribe and Congress to diminish the reservation in the years leading up to the 1882 Act.

On two occasions in 1871, the Tribe, through its designated federal agent, petitioned Congress to sell the uninhabited westernmost portion of the reservation in order to obtain additional financial resources. J.A. 194, 419, 424, 573. The Tribe requested that the 50,000 acres "be separated from the remainder" of the reservation and offered for sale. J.A. 573, 629. The Commissioner of Indian Affairs supported these requests and reiterated, "I believe that the general idea of diminishing these reservations for the purpose of

securing higher cultivation of the remaining lands, is consonant with sound policy." J.A. 194, 625.

Congress responded by enacting the Act of June 10, 1872 ("1872 Act"), providing for the sale of 50,000 acres "to be taken from the western part" of the reservation and "separated from the remaining portion of said reservation." J.A. 631. Although the 1872 Act authorized land sales from other tribal reservations, it is significant that those other sales (i.e., land other than the disputed area involved in this case) were not identified as involving a separation from the reservations. J.A. 632-34. The 1872 Act is very much a part of the legislative history of the 1882 Act.

Because of the availability and pricing of other land, the 1872 Act only accomplished the sale of 300 acres. J.A. 195, 333-35. In 1874, the Commissioner of Indian Affairs reported that the reservation contained 192,867 acres, but he continued: "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve." J.A. 195, 360-61, 504. This description, even in 1874, indicated the Commissioner considered the disputed area as detached from the remainder of the reservation as a result of the 1872 Act.

The Tribe continued to request to have the uninhabited land sold. In 1880, Congress considered legislation, as explained by Senator Alvin Saunders of Nebraska, to facilitate the sale of the western 50,000

acres of the reservation not sold under the 1872 Act because of price. J.A. 196-97. The 1880 proposal did not advance. J.A. 196, 197. Again in December of 1881, Senator Saunders proposed another bill authorizing the sale of land, but this proposal did not advance either. J.A. 336-37. Although Senator Saunders' 1880 and 1881 proposals did not advance, it appears that Congress understood the Tribe wanted the land sold and that the land east of the railroad right-of-way would constitute the Tribe's diminished reserve.

During the intervening period between the 1872 Act and the 1882 Act, the Omaha granted the Sioux City and Nebraska Railroad Company a right-of-way through the reservation, beginning at the northern edge and generally running southward along the Middle and Logan creeks. J.A. 336. Critically, the railroad right-of-way now provided a clear demarcation of the boundary-line west of which all land would be sold. J.A. 360, 1193.

B. The Legislative History Of The 1882 Act Demonstrates The Understanding The Reservation Would Shrink As A Result Of The Legislation.

The 1882 Act was nearly identical to the 1872 Act, both in its terms and objectives. As explained by Senator Saunders: "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed (J.A. 582, 644), ... Twice they have expressed themselves already in open council in

favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold." J.A. 469.

According to a report submitted by the local Indian agent, "there are no Indians living on the western portion of the Omaha Reservation." J.A. 657. Therefore, Senator Ingalls explained under the bill that "[t]he lands that [the Tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished." J.A. 647. The 1882 Act "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." J.A. 647. Senator Dawes explained: "When this bill came in I was troubled lest the sale of 50,000 acres would leave the [Omaha] reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation." J.A. 683.

In the House of Representatives, Representative Edward Valentine of Nebraska added: "they do not care about making selections over on that side of the road at all." J.A. 201, 739. Representative Valentine further explained:

> You cannot find one of those Indians that does not want the western portion sold, not

> the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

J.A. 201, 726. Local Omaha and Winnebago Agent George Wilkinson subsequently verified this information and reported that the tribe consented to the act on May 5, 1883. J.A. 345.

C. The 1872 And 1882 Acts Predate The Dawes Act And Are Unlike General Allotment Acts.

It is important to distinguish the 1872 and 1882 Acts "from a run-of-the-mill allotment act." *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 663 (7th Cir. 2009). The vast majority of reservation surplus land passed out of tribal control following the 1887 enactment of the General Allotment Act, also known as the Dawes Act. In fact, all of this Court's opinions

deciding whether a reservation was diminished or disestablished involved a pre-Dawes allotment act. See *Hagen*, 510 U.S. at 402-07 (analyzing a series of acts in the early 1900s); *Yankton Sioux Tribe*, 522 U.S. at 329 (analyzing 1894 Act); *Solem*, 465 U.S. at 464 (analyzing 1908 Act); *Rosebud Sioux Tribe*, 430 U.S. at 584 (analyzing 1904, 1907, and 1910 Acts); *DeCoteau*, 420 U.S. at 441-42 (analyzing 1891 Act); *Mattz v. Arnett*, 412 U.S. 481, 484-85 (1973) (analyzing 1892 Act); *Seymour v. Supt. of Wash. State Pen.*, 368 U.S. 351 (1962) (analyzing 1906 Act).

The 1872 and 1882 Acts at issue in this litigation predate and differ from post-Dawes Act surplus allotment acts, in which individual parcels of land were allotted to tribe members with the remaining parcels declared surplus and opened for settlement by, and sale to, non-Indians. See, *e.g.*, *Solem*, 465 U.S. at 466-67. This is significant because instead of creating a checkerboard pattern of land ownership that sought to integrate non-Indian settlers amongst tribal members, here Congress sought to sell to non-Indian settlers land in an area that was "slice[d] off from the [. . .] reservation." *Stockridge-Munsee Cmty.*, 554 F.3d at 663.

The 1872 and 1882 Acts were consistent with the view of the Commissioner of Indian Affairs F.A. Walker at the time of the 1872 Act, who believed Indians should still be separated and secluded on reservations. Walker believed that any reductions to reservations should be accomplished by "cutting off

distinct portions from the outside, and not in such a way as to allow veins of white settlement to be injected, no matter whether along a stream or along a railway." J.A. 593.

The actions of Congress and the Tribe were also consistent with this goal. The Tribe had requested the disputed area be "separated from the remainder" (J.A. 629), and Senator Ingalls agreed the bill would "break[ ] up that portion at least of the reservation which is to be sold" and "segregate[ ]" the lands occupied by Tribe members. J.A. 647. While Petitioners acknowledge that 10-15 allotments were selected by tribal members in the disputed area, 5 of those allotments were largely located east of the railroad right-of-way, and "[n]o Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands." J.A. 598-99. Congress recognized that even the land selected by Indians would be "segregated from the remainder of the reservation . . . so that the interest and control of and jurisdiction of the United States is absolutely relinquished." J.A. 647. The ultimate goal was not to integrate land ownership, but to separate the disputed area from the reservation.

Both Congress and the Tribe intended to separate and segregate the western portion of the reservation from the eastern portion by virtue of the railroad right-of-way as the western boundary, with minimal, if any, Tribe members selecting allotments on the western side, and no settlement by non-Indians on the eastern side allowed. This backdrop logically influences interpretation of the

congressional purpose behind the 1882 Act and distinguishes that Act from the run-of-the-mill allotment act.

III. THE 1882 ACT SUPPORTS DIMINISHMENT.

A. An Explicit Reference To Cession Is Not A Prerequisite For A Finding Of Diminishment.

This Court has repeatedly emphasized that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Solem*, 465 U.S. at 471; accord *Hagen*, 510 U.S. at 411 ("[W]e have never required any particular form of words before finding diminishment."). This is in part because "Congress . . . generally did not distinguish between title and boundary concerns and, in fact, seemed oblivious to future disputes that might arise over Indian jurisdiction." *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1394 (10th Cir. 1990). "Today a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1115(a), but back then, the 'notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.'" *Stockbridge-Munsee Cmty.*, 554 F.3d at 662 (quoting *Solem*, 465 U.S. at 468). Additionally, "Congress believed that all reservations would soon fade away – the idea behind the allotment acts was the ownership of property would prepare Indians for citizenship in the United States, which, down the road, would make reservations obsolete." *Id.* "[G]iven this backdrop, [courts]

cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation." *Id.* Here, the lower courts found the statutory language unclear. Pet. App. 6, 76.

The language of the 1882 Act, while not explicitly addressing the issue, does contain evidence that Congress intended that the original boundaries of the Tribe's reservation would be diminished. The 1882 Act authorized the Secretary of the Interior "to cause to be surveyed, if necessary, and sold, all that portion of [the Omaha Reservation] in the State of Nebraska lying west of the right of way. . . ." J.A. 227. Section 1 defines the scope of the land potentially diminished. The Act goes on to provide "[t]hat after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement." *Id.* Under Section 2, the land in question was clearly opened to settlement by non-Indians. Upon settlement and compliance with the terms of sale, "patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts." *Id.* at 227-28.

Additionally, Congress authorized the Secretary of the Interior, with the consent of the Tribe, to extend the non-Indian settlers' payment period on multiple occasions. J.A. 205, 352. The 1888 extension directed the Secretary of the Interior to declare certain purchasers' tracts forfeited due to default on payment. J.A. 206, 352. Upon forfeiture, a settler's

tract was to be sold at public auction, not revert back to the Tribe. J.A. 206, 352, 360.

The Court in *Rosebud Sioux Tribe* and *Hagen* found diminishment when similar disparities in language existed. Thus, "the notion that [clear language of express termination] is the only method by which congressional action may result in disestablishment [or diminishment] is quite inconsistent," *Rosebud Sioux Tribe*, 430 U.S. at 588 n.4 (emphasis added), with the "traditional approach to diminishment cases, which requires [courts] to examine all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 411 (emphasis added). Together, *Rosebud Sioux Tribe* and *Hagen* show that the lack of explicit references to cession and language distinctions between the 1882 Act and prior Omaha Indian Treaties are neither dispositive nor particularly illuminating of Congress' intent to diminish the reservation.

Under this holistic framework considering all circumstances, both the Seventh and Tenth Circuits have found reservations diminished/disestablished even though the operative congressional act did not have cession or sum certain payment language. See *Stockbridge-Munsee Cmty.*, 554 F.3d at 662-65 (concluding the Stockbridge-Munsee Indians' Reservation was diminished despite the fact that "[t]he 1871 Act includes no hallmark diminishment language"); *Osage Nation*, 597 F.3d at 1127 (concluding the 1906 Osage Allotment Act disestablished the Osage Reservation). Given the circumstances surrounding the disputed

area in this case, the lower courts erred by not reaching a similar conclusion.

It is also significant that when opening the land west of the railroad right-of-way, Congress did not reserve any portion of these lands for Indian use or carve out any mineral or other land rights from the opened area. J.A. 227-33. These facts distinguish the surrounding circumstances of this case from those in *Solem*, where the allotment act envisioned and/or provided for future tribal use of the land. *Solem*, 465 U.S. at 474 (explaining that the Cheyenne River Act authorized the Secretary "to set aside portions of the opened land for agency, school and religious purposes . . . for the benefit of said Indians" and reserved mineral resources in the land for the whole tribe). Such provisions "strongly suggest that the unalloted opened lands would for the immediate future remain an integral part" of the reservations. *Solem*, 465 U.S. at 474. Conversely, the absence of such provisions in the 1872 and 1882 Acts suggests Congress did not view the land west of the railroad right-of-way as continuing to be a part of the reservation. Rather, all of the land west of the railroad right-of-way was available for settlement and transfer to non-Indian settlers.

B. The Tribe's Lack Of Residence On The Disputed Area Explains The Lack Of Cession Language.

The absence of explicit cession language in the 1872 and 1882 Acts is even less illuminating as to

Congress' intent in light of the historical context. The circumstances on the reservation are distinguishable from those present with other surplus land acts. For example, in *Mattz*, 412 U.S. at 489, the Indians were residing on the land at the time of the act's passage. Thus, the Court emphasized the need for "vacating" language in the act. But here, when debating passage of the 1882 Act, members of the Tribe did not reside on the disputed area. J.A. 583, 657, 726, 739. Rather, the Tribe members resided east of the railroad right-of-way. J.A. 330-31. This was a commonly understood fact in 1882. Accordingly, there was less need to specifically provide some of the hallmark diminishment language that was present in other surplus land acts.

Furthermore, understanding the historical context helps explain why the inclusion of hallmark cession language in the 1854 and 1865 Treaties with the Tribe, as compared to the absence of such language in the 1882 Act, is not particularly enlightening. Unlike the 1882 Act, the 1854 Treaty required the Tribe to physically vacate land, making express cession language necessary. J.A. 328-29, 1019-28 (explaining the effect of the 1854 Treaty). The 1865 Treaty's use of cession language was also necessary considering the purpose of the treaty was to provide land for the United States to set up a reservation for the Winnebago Tribe. J.A. 329 (explaining the effect of the 1865 Treaty). To accomplish this objective, Congress needed to first eliminate the entirety of the

Tribe's right to the land before giving the same land to the Winnebago Tribe for its reservation.

With the 1882 Act, Congress did not face the same need to transfer full and complete title away from the Tribe, as that would occur once the land was either allotted to tribe members or settled upon and sold to non-Indians. After all, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest." *Solem*, 465 U.S. at 468. Congress assumed at that time that the reservation status of the Indian land was coextensive with tribal ownership. See *Solem*, 465 U.S. at 468.

The practical reality of the circumstances surrounding the land transfers dictated that the 1854 and 1865 Treaties needed to include this cession language to accomplish their objective, while the 1882 Act did not.

IV. THE PUBLIC'S JUSTIFIABLE EXPECTATIONS WILL BE UPSET BY EXPANDING THE JURISDICTION OF THE TRIBE OVER 130 YEARS AFTER DIMINISHMENT.

For over 130 years, the people and businesses of the Pender, Nebraska area have developed justifiable expectations that their community was under the jurisdiction of the State of Nebraska. The lower courts' decisions in this litigation destroyed that

longstanding status quo and upset the public's justifiable expectations.

Petitioners expect the Tribe and United States will continue to downplay the effect of altering the status quo by expanding the jurisdiction of the Tribe over 130 years after diminishment. Doing so, however, ignores this Court's observations that "when an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country *seriously burdens the administration of state and local governments*." *Hagen*, 510 U.S. at 420-21 (quoting *Solem*, 465 U.S. at 471-72, n.12 (emphasis added)).

For over a century, State and local governments have relied on the 1882 Act, and the actions and/or inaction taken by the Tribe and United States, in asserting their own civil and criminal jurisdiction in the disputed area. Notably, Respondents' recent effort to assert jurisdiction in the disputed area is not a comprehensive plan to administer a broad array of government services in and around Pender, but rather simply to derive revenue from the sale of alcohol in Pender's liquor retailers and bars. In service of that goal, Respondents ask this Court to rewrite history. The Court should decline Respondents' invitation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted this 16th day of November, 2015.

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